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No. 99-

IN THE

Supreme Court of the United States

NEWSPAPER AND MAIL DELIVERERS UNION OF NEW YORK AND VICINITY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether New York Penal Law § 460.20, now known as the "Enterprise Corruption", Law is Constitutional as applied in this case wherein an unincorporated association, namely a recognized Labor Union known as "The Newspaper and Mail Deliverers Union of New York and Vicinity" (hereafter NMDU) can be charged with criminal conduct as a "*person*" under New York Law, an issue of first impression in the State of New York (170 Misc. 2d 790) (*see United States v. Local 807*, 315 U.S. 521 (1942) which, in principle, seems to hold to the contrary)?

2. Whether a Labor Union, functioning solely as a Labor Union, can be prosecuted as a "person" (*see United States v. Local 807*, 315 U.S. 521 (1942)?

3. Since *Martin v. Curran*, 303 N.Y. 276 (1951), which was cited by Justice Rothwax of the Supreme Court New York County in his decision dismissing the indictment, clearly indicates that New York "still adheres to the Common Law Rule that an unincorporated association is not an artificial person and that no agency relationship exists between the members of such associations, including Labor Unions", (A64[1], 170 Misc. 2d at 802), whether the New York Statute charging "Enterprise Corruption" and the opinion of the Appellate Division of the Supreme Court, First Department, upholding the indictment violated the defendant-petitioner's

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1. (Figures preceded by the Letter "A" refer to pages of the Appendix to the Appeal in the Appellate Division, N.Y. Supreme Court, First Department).

Constitutional Rights under the Fourteenth Amendment Due Process as well as the equal protection of the law Clause, as well as Federal Statutes?

4. Whether the failure of the Prosecutor to instruct the Grand Jury, which returned the indictment, on the Common Law standard of liability, rendered the indictment null and void, and contrary to the Fourteenth Amendment of the Constitution and contrary to this Court's opinion in *United States v. Local 807*, 315 U.S. 521 (1942) and *Martin v. Curran*, *supra*?

5. Whether New York Labor Law § 807(6) conflicts with the Common-Law Rule that Justice Rothwax held must be applied in a case such as the one at Bar (A68, 170 Misc. 2d at 805-806)?

6. Whether it is Unconstitutional for New York to have promulgated a law which allows a Labor Union to be liable for illegal conduct committed by officers, members or agents, unless it can be established that every member individually authorized or ratified the wrongful act charged (Fourteenth Amendment, United States Constitution; *United States v. Local 807*, 315 U.S. 521 (1942)?

7. Since there is no evidence that every single member of the NMDU jointly and severely ratified and authorized the alleged wrongful acts, whether the Statute allowing prosecution of a Labor Union, as in the case at bar, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and is contrary to this Court's opinion in *United States v. Local 807*, 315 U.S. 521 (1942)?

8. Since the *indictment* of the petitioner herein by a Grand Jury in New York County concededly *presents an issue of first impression in New York*, whether that indictment can be sustained under the Fourteenth Amendment of the United States Constitution and the N.L.R.A. in view of this Court's holding in *United States v. Local 807*, 315 U.S. 521 (1942), which interpreted a similar, though not identical, Statute, namely the Federal Anti-Racketeering Act, which proclaimed that the Legislative history of the Federal Act showed that it was intended to suppress terroristic activities of professional gangsters, and *not to interfere with traditional Labor Union activities*?

9. Whether New York Penal Law § 460.20(1)(a), as applied, is interfering with rights protected by the National Labor Relations Act in violation of 42 U.S.C. § 1983 and the Labor Management (a) Reporting and Disclosure Act, 29 U.S.C. § 524, as applied herein (*United States v. Local 807, supra*)? (*See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959)).

10. Whether a Labor Union, such as the NMDU, may ever be prosecuted as an artificial "person" for crimes defined by the Penal Law and if so, whether NMDU may be prosecuted for "Enterprise Corruption" as applied in this case?

11. Whether the case against the Petitioner complied with Section 13 of the N.Y. General Associations Law requiring all suits to be in the name of its President or Treasurer (C.A.N.Y. 1964, 334 F.2d 392) and ratified by all members of the Union?

12. Whether the Prosecution herein in question and the opinion of the Appellate Division below approving the indictment and implications of the Statute in question, in essence undermines the Federal Statutes pertaining to Unions involved in Inter-State Commerce as is the Petitioner, and substantially emasculates the thrust of the Wagner Act and the NLRA and it progency?

PARTIES TO THE PROCEEDING

The parties herein are the People of the State of New York and The Newspaper and Mail Deliverers Union of New York City and Vicinity (NMDU) as alleged in the caption of this petition. The NMDU is a Union affecting Inter-State Commerce.

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The Opinion of the New York Supreme Court, Appellate Division First Department is reported at 250 App. Div. 2d 207, 683 N.Y.S.2d 488 (1st Dept. 1998). (Appendix A).

The Order of the New York Court of Appeals per Judge Rosenblatt, denying Leave to Appeal is dated the 26th day of August, 1999. (Appendix C).

STATEMENT OF JURISDICTION

Jurisdiction for this Court is predicated upon issues affecting the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. In addition, an Issue is presented under Federal Statutes, namely the National Labor Relations Act, 29 U.S.C. § 157, *et seq*. and (42 U.S.C. § 1983) concerning whether the New York Penal Law § 460.20(1)(a) interferes with the rights of the Petitioner under those acts.

The Motion for Rehearing and Reconsideration was made to the New York Court of Appeals in a timely manner, and a Certificate denying Leave to Appeal was issued by that Court on the 26th day of August, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Notification required by Rule 29.4(c) has been made on the Attorney General of the State of New York.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fourteenth Amendment, Due Process and Equal Protection Clauses thereof.

2. The Federal Anti-Racketeering Act, particularly 18 U.S.C. § 420(d).[2]

3. New York State Penal Law § 460.20, known as the "Enterprise Corruption Law".[3]

4. The National Labor Relations Act, 29 U.S.C. § 157, *et seq.* and 42 U.S.C. § 1983.

5. New York State Labor Law § 807(6).

This Section of the Labor Law in essence insulates Unions in Labor disputes from liability for acts of individual officers, members or agents, except upon proof of the Union's actual conduct, established by proof of "actual participation in, actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organizations". New York State Penal Law § 460.20.[3]

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2. The Federal Anti-Racketeering Act included § 420(d), 18 U.S.C. § 420(d), as follows:

> *Provided*, that no Court of the United States shall construe or apply any of the provisions of the provisions of this Act in such a manner as to impair, diminish, or any manner affect the rights of bona-fide Labor Organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

3. "Enterprise Corruption" under New York State Penal Law § 460.20 in essence declares that

(Cont'd)

This Statute seeks forfeiture of Union property, including contract rights, and collective bargaining rights.

We are confident that this Court is well aware of the fact that this Union in the present petition is subject to the provisions of the National Labor Relations Act and other Federal Statutes.

6. New York State Penal Law § 10.00(7) is pertinent hereto as well because that Statute defines "person". Its definition of person is a "human being, and where appropriate a public or private Corporation, an Unincorporated Association, a partnership, a Government or a Governmental instrumentality".

This Statute clearly states that the Legislative intent that an Unincorporated Association, such as a Labor Union, may be criminally liable under New York Law. However, Criminal Liability of a Corporation (Penal Law § 20.20) contains no definition of the scope of Criminal Liability of an Unincorporated Association.

7. The General Associations Law of New York, Section 13, governs the manner in which a general association can be sued or served. Ordinarily, such association must be sued in the name of its President or Treasurer (*Mason v. American Express, Co.*, C.A.N.Y. 1964, 334 F.2d 392).

(Cont'd)

> A person is guilty of "Enterprise Corruption" when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such an enterprise i.e.: (a) *intentionally* conducts or participates in the affairs of an enterprise by participating in a pattern of activity . . .

INTRODUCTION AND STATEMENT OF THE FACTS

The opinion of the late Justice Rothwax sets forth the basic elements of the case herein. For the convenience of the Court, we are giving the gist of the facts essential to the consideration of this case and have taken some of the language from the Justice's opinion. (*His entire opinion appears in 170 Misc. 2d 790, 649 N.Y.S.2d 760*).

Petitioner herein, The Newspaper and Mail Deliverers Union of New York and Vicinity (hereinafter referred to as "NMDU"), has been indicted for a single count of "Enterprise Corruption" in violation of New York Penal Law § 460.20. The single count upon which the indictment rests is itself supposedly based upon a different indictment charging 81 Pattern Acts committed by individual unindicted NMDU officers, members or agents acting together and with other unindicted co-conspirators who work for the distribution departments at two newspaper companies and an independent distributing company, with which the NMDU had collective bargaining agreements, or who operated Non-Union "bootleg" companies with which the NMDU had no such agreements.

Several of the unindicted co-conspirators, including some Union members, are alleged to have had ties to organized crime. *No Human being is indicted in the case at bar*!

The same Grand Jury which indicted the NMDU voted two separate indictments charging the various individual actors with enterprise corruption and/or the substantive crimes which make up 71 of the 81 pattern acts charged in the indictment against the NMDU.

"Enterprise Corruption" is defined under Penal Law § 460.20 as follows:

> A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he: (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity . . .

A Labor Union is an artificial entity which cannot act except through its officers, members or agents. Thus, for the NMDU to be prosecuted for enterprise corruption, it must be held vicariously liable for the acts committed by its officers, members, or agents. But the highest Court of New York State held that the *Common Law rules still prevail in this State and thus no agency relationship exists between this Union and the members thereof.* (*Martin v. Curran*, 303 N.Y. 276 (1951). (*See also People v. Newspaper and Mail Deliverers*, 170 Misc. 2d 790, 640 N.Y.S.2d 760 (1996), *rev'd*, 250 App. Div. 2d 207, 683 N.Y.S.2d 488 (1st Dept. 1998).

Since this case turns on the question of whether the Opinion and Order of Justice Rothwax, dismissing the indictment, can be sustained, despite its overruling by the New York Supreme Court Appellate Division, First Department, we must analyze to some extent that opinion of Justice Rothwax. There are other bases upon which the indictment should have been dismissed. He was a well thought of Justice as well a Professor of Law at Columbia University.

On Page A55 of the Appendix, which is also Page 6 of his opinion, Justice Rothwax says that the rules developed by Federal Courts for determining when a Labor Union may be found in violation of the Racketeering Influence and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 etc., upon which the New York Organized Crime Control Act (OCCA), (Penal Law § 460.00) is predicated makes it obvious that Federal Law is implicated in determining the issues in this petition. Thus, Justice Rothwax states:

> To avoid penalizing a Union which is really the victim of organized criminal activity, Federal Courts require proof that the Union is an 'aggressive entity' that is a central figure in the criminal enterprise and not merely a 'conduit' that unknowingly facilitated the criminal activity.

Citing *Haraco v. Am. Nat.'l Bank and Trust Company*, 747 F.2d 384, 401 (7th Cir. 1984), *aff'd*, 473 U.S. 606, 105 S. Ct. 3291 (1985); and *Amendolare v. Schenkers Int'l Forwarders, Inc.*, 747 F. Supp. 162, 168-169 (E.D.N.Y. 1990).

Justice Rothwax continues trying to interpret what the Federal Courts have in mind and what the realities of the case at bar actual are.

Obviously, when we look at the Federal Statutes such as the RICO Statutes in the Federal Anti-Racketeering Law, we perceive that these are aimed not at the Unions, but at professional gangsters and terrorists. In this Court's opinion in *United States v. Local 807*, *supra*, 315 U.S. 521 at 529, it specifically points out that the Federal Statutes, namely the Anti-Racketeering Statute, which we submit applies to this Union and to this case, declares:

> *Provided*, that no Court of the United States shall construe or apply any of the provisions of this act in such a manner as to impair, diminish, or in any manner affect the rights of bona-fide Labor Organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing Statutes of the United States

(18 U.S.C. § 420(d)).

The Petitioner herein is a legitimate Union.

What has been overlooked obviously by the Courts below is that since 1974, the NMDU has been under the supervision of a Special Administrator appointed by United States District Judge William C. Conner, in the case of *Paterson v. NMDU*, 73 Civ. 3058, 4278 (W.C.C.) ("SDNY") (1974). Judge Conner appointed a Special Administrator pursuant to a consent decree and this Special Administrator has supervised the industry since 1974.

The Administrator heard numerous claims, many of which were brought before Judge Conner for his review. The Special Administrator has undertaken to assure that the NMDU membership and industry employment was fair to minorities and sought to prohibit any practices whereby Union membership or employment in the industry were controlled by corrupt influences.

Thus, there is simply no way the District Attorney can claim at this time that the rights of the members of the NMDU are in jeopardy.

In essence, Justice Rothwax held that the instructions given to the Grand Jury by the Prosecutor which did not define terms such as "actual participation", "actual authorization and ratification after knowledge of acts perpetrated by individual Union officers, members, or agents", precluded the Jury from intelligently determining whether there was probable cause to believe that the Union committed any crime.

Furthermore, Justice Rothwax held that the Prosecutor utilized the wrong Legal standard in defining a Labor Union's liability by instructing the Grand Jury that the Union was liable for criminal bad acts of its members.

The determination of the Appellate Division, First Department, to reverse, fails to recognize the Legal standards that must be applied to a legitimate Labor Union. Furthermore, there is a single count charging "Enterprise Corruption" involving only the Union and none of its members.

Standing alone, we submit that there is no basis upon which the indictment herein can be sustained and that this indictment not only violates the Constitutional Rights of the Union itself, but it also violates the standards of the National Labor Relations Act and other Federal Statutes which apply to this Union.

Furthermore, the interpretation by Justice Rothwax of what was necessary to instruct the Grand Jury in order to sustain the indictment was not even followed.

The position of the petitioner of course, is that under no circumstances could an indictment be sustained, but even

assuming, *arguendo*, that it could, we maintain that even using the standard that was employed by the *Nisi Prius* Justice, the indictment cannot stand here and the petition should be granted and the indictment should be declared in violation of the rights of the petitioner, and thus be dismissed.

REASONS FOR GRANTING THE WRIT

I.

THE NEW YORK STATE PENAL LAW § 460.20(1)(a) AS APPLIED HEREIN INTERFERES WITH THIS UNION'S RIGHTS AS PROTECTED BY THE N.L.R.A. IN VIOLATION OF 42 U.S.C. § 1983.

The general rule, is that State Governments are prohibited by Federal Law from regulating Labor Unions affecting Interstate Commerce. To a very limited extent, they are permitted, in extraordinary circumstances, to pass legislation affecting Labor Unions (29 U.S.C. § 524(a)). That Federal Statute grants a State the very narrow right to enact a criminal Statute which is directed at rooting out Labor Racketeering in a specific industry infested with such Racketeering and with prohibiting corrupt individuals from serving in a Union position.

But a perusal of the State Statute clearly indicates that the State has arrogated to itself the power to regulate labor relations to a far greater extent than is permitted by Federal Statute. The indictment herein seeks to cause the NMDU to forfeit its rights to act as a collective bargaining representative of its members and to take control of the NMDU under the authority of a State Statute ostensibly

outlawing racketeering activity. This of course, exceeds narrow exception to preemption found in 29 U.S.C. § 524(a).

Thus, the *nisi prius* Justice (the late Justice Rothwax) was correct in dismissing the indictment, but his reasons were by no means complete.

We submit that the indictment herein must be dismissed in order to preserve the Federal Labor Law Rights of the NMDU and its members and the exclusive jurisdiction of the Federal Courts and Agencies over Labor Relations.

In the Court's opinion in *United States v. Local 807*, *supra*, 315 U.S. 521, 529, as we have already quoted previously in this petition, that opinion and decision of this Court specifically indorsed the exclusion to the Federal Anti-Racketeering Statute wherein 18 U.S.C. § 420(d), declared that no Court of the United States shall construe or apply any of the provisions of this act in such a manner as to impair, diminish, or in any manner affect the rights of bona-fide Labor Organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in the existing Statutes of the United States.

There can be no dispute of the fact that the laws of the United States are the Supreme Laws of the land (U.S. Const., Art. IV). *See Hines v. Davitowitz*, 312 U.S. 52, 67, 61 S. Ct. 399 (1941); and *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 75 S. Ct. 191 (1954).

That Congress intended the field of Labor Management Relations to be within the *exclusive domain of Federal Regulations* and *preemptive of State interference* is a principle of Law established beyond cavil (*San Diego*

Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959)).

In *Garmon*, this Court clearly announced the doctrine of Federal Preemption in the area of Labor Relations. This tribunal, in essence, held that State Courts are preempted in from asserting jurisdiction involving State claims which are "arguably" unfair labor practices within the purview of Sections VII and VIII of the National Labor Relations Act (NLRB), 29 U.S.C. §§ 157 and 158, and that only the National Labor Relations Board (NLRB) may assert jurisdiction over such claims. For example, in *Garmon*, *supra*, where an employer sued a Union for alleged unlawful interference with its business, this Court dismissed the action ruling that the State Courts were powerless from asserting jurisdiction over such claims.

This tribunal held:

> When an activity is arguably subject to §7 or §8 of the Act (NLRA), the State . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with National Policy is to be heard.

(359 U.S. at 245, 79 S. Ct. at 780).

This doctrine announced in the *Garmon* case, is binding upon the State Courts under the Supremacy Cause of the United States Constitution, Article IV. *See Doley v. Anton*, 8 N.Y.2d 91, 95, 202 N.Y.S.2d 273 (1960); *Columbia Broadcasting System v. McDonough*, 6 N.Y.2d 962, 191 N.Y.S.2d 162 (1959).

Under the Enterprise Corruption Statute which is involved herein, the State of New York, in essence, would require the NMDU to forfeit its right to bargain collectively on behalf of its members.

Furthermore, it is strange and disturbing that the Courts below have failed to realize that since 1974, the NMDU has been under the supervision of a Special Administrator appointed by United States District Judge William C. Conner, in the case of *Paterson v. NMDU*, 73 Civ. 3058, 4278 (W.C.C.) (SDNY) (1974). Judge Connor appointed a Special Administrator pursuant to a consent decree and this Special Administrator has supervised the industry since 1974.

The Administrator has heard numerous claims, many of which were brought before Judge Connor for his review. This Special Administrator has undertaken to assure that the NMDU Membership and Industry Employment was fair to minorities and sought to prohibit any practices where Union Membership or Employment in the industry were controlled by corrupt influences.

Thus, there is simply no way that the Prosecutor herein can claim at this time that the rights of the members of the NMDU are in jeopardy.

Thus, we maintain that the State of New York does not even have jurisdiction to enact legislation such as the Corrupt Organizations act (New York Penal Code § 460.20(1)(a)).

II.

THE NEW YORK PENAL CODE, § 460.20(1)(a) WAS NOT ENACTED TO REMOVE THE THREAT OF LABOR RACKETEERING ACTIVITY IN A SPECIFIC INDUSTRY. IN *BROWN v. HOTEL & RESTAURANT EMPLOYEES UNION*, 468 U.S. 491, 104 S. Ct. 3179 (1984), THE SUPREME COURT FACED THE ISSUE OF WHETHER A NEW JERSEY STATUTE REGULATING ELIGIBILITY TO HOLD UNION OFFICE IN THE CASINO INDUSTRY WAS PREEMPTED BY § 7. THE COURT HELD THAT WHILE NEW JERSEY COULD PUT RESTRICTIONS ON *QUALIFICATIONS* FOR UNION OFFICERS, IT COULD NOT IMPOSE RESTRICTIONS ON DUES COLLECTION, IF SUCH A RESTRICTION WOULD PREVENT THE UNION FROM "FUNCTIONING AS A LABOR UNION" (468 U.S. 509, 104 S. Ct. at 3190). *SEE ALSO ALABAMA STATE FEDERATION OF LABOR v. McADORY*, 35 U.S. 450, 325 S. Ct. 1384 (1945).

In summary therefore, the *Brown* decision and opinion held that a State may regulate Union conduct only:

(a) If the State passes a Statute intended to root out organized crime in a "particular industry", 468 U.S. at 509, 104 S. Ct. at 3189; and

(b) The State Statute imposes regulations and eligibility for Union Officers but does not interfere with the ability of the Union to function as a collective bargaining representative.[4]

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4. Herein, the Prosecutor want the Petitioner to forfeit its Collective Bargaining Rights.

We submit that neither of those exceptions applies to the case at bar.

In response to the *Brown* decision, Congress enacted 29 U.S.C. § 524(a) as part of the Labor Management Reporting and Disclosure Act (L.M.R.D.A.) to carve out a narrow and limited exception to the § 7 presumption.

Section 524(a) of the L.M.R.D.A. was enacted as part of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, Title II, § 2201, 98 Stat. 2192. It provided that in order for a State Regulation of Union activity to be exempt from preemption, the State Statute must:

(a) Be part of a scheme to eliminate pervasive racketeering activity in an entire specific industry that has a history of being infected with such crime; and

(b) apply equally to employer, employees, and labor organization;

(c) govern service in a position in a Labor Organization which acts as a collective bargaining representative in the industry that is subject to the Statute.[5]

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5. Here, the New York Statute § 460.20(1)(a) of the New York Penal Law was patterned after the Federal RICO Statute, 18 U.S.C. § 1661, *et seq.*

The Practice Commentary to the Statute contained in McKinney's Penal Code, Title X, Organized Crime Control Act, Article 460 — Enterprise Corruption, clearly indicates that it is modeled after the Federal RICO Act.

III.

THE STATUTE HEREIN, N.Y. PENAL CODE § 460.20(1)(a), CLEARLY WAS NOT ENACTED TO REMOVE THE THREAT OF LABOR RACKETEERING ACTIVITY IN A "SPECIFIC INDUSTRY".

As has already been demonstrated, § 524(a) of the L.M.R.D.A. requires that a State Statute be directed at eliminating a history of labor racketeering activity in a "particular industry".

Here, the New York Statute is attempting to enforce a Statue of general applicability equivalent to a State version of the Federal RICO Statute. Unlike the case in *Brown*, *supra*, the instant Statute does not address itself to a specific "crime infested industry".

The *Brown* case Statute regulated eligibility for Union Officers in the New Jersey gaming industry. In the instant Statute, the legislation is not addressed to any specific industry or to the relationship of any Labor Unions, Employees and Employer in such an industry. It is merely a general purpose criminal racketeering Statute. Indeed, § 524(a) provides expressly that the State Statute must be directed at a Labor Union "which acts or seeks to act in that State as a collective bargaining representative pursuant to the National Labor Relations Act *in the industry that is subject to that program.*" The Statute herein does not fit that definition.

Furthermore, § 524(a) requires that the State Law govern only qualification for service in the Union. This satisfies the distinction made in the *Brown* case which permitted State

regulation by a Statute which imposed restrictions on holding Union office, but remanded the issue of whether the Union could be prohibited from collecting dues to see if it interfered with the Union's "functioning as a Labor Organization". (104 S. Ct. at 3190).

In other words, unlike the Statue herein, the *Brown* restrictions did not affect eligibility for Union office by the State Statute, but prohibited State regulation of the Union to function as a bargaining representative for its members.

In the case at bar, the instant New York Statute is being applied far beyond the permissible boundaries. The State herein seeks to cause the Union "to forfeit" its very right to act as a collective bargaining agent.

Thus, the specific information attached to the indictment herein declares:

> THE GRAND JURY OF THE COUNTY OF NEW YORK, by the Special Information accused the Defendant, Newspaper and Mail Deliverers Union of New York and Vicinity (NMDU), of being required according to Penal Law §460.30, to forfeit certain property to the State as follows and one of the forfeited rights is with respect to enforcement of collective bargaining agreements, including but not limited to NMDU Constitution Articles VII-X.

On top of that, the District Attorney herein seeks to have the Court, that is the State Court, appoint a temporary receiver to the NMDU, thus wresting control from its elected officers. This goes to the very heart of the functioning of the Labor

Organization and far beyond the limited authority granted by § 504(e) to States to restrict who may hold Union Office and specific industries rife with corruption.

It is thus manifest that the Statue as applied steps squarely on the toes of the NLRA and exceeds the permissible bounds of § 504(a).

The Prosecutor in New York is not attempting to remove corrupt officers (because there aren't any left), but to take over the Union itself. As such, the Statute as applied is clearly violated by the indictment and the indictment must therefore be dismissed.

Furthermore, as we have pointed out, Judge Connor of the Southern District of New York has already, as far back as 1974, appointed a Special Administrator to oversee the Union so obviously the District Attorney is not even familiar with what is going on with respect to the Union because that Special Administrator has already been appointed and a receiver would be redundant and improper.

Another aspect of the impropriety of the State Statute can be seen from Penal Law § 460.20(1)(a) which provides that a person convicted of "Enterprise Corruption" may be required to forfeit any property: (i) "affording a source of influence over the Enterprise"; and (ii) the "use of which" by the defendant "contributed directly and materially to the crime", and (iii) unless "such forfeiture is thus proportionate to the defendant's gain from the enterprise."

Incredibly, the Prosecution in quoting from that Statute offers no argument as to how these rights meet the requirements of the Statute. The sole mention in the "Special

Information" of these rights as a "source of influence" that "contributed" to the crime charged, are casual references in the verbatim language of the Statute; and there is no reference to the question of disproportion between the forfeited property and the defendant's "gain".

In essence, the Federally Protected Rights of the Union members here meet none of the tests laid down in the Statute.

First of all, they are not "property", they are legal right conferred by § 7 of the NLRA, 29 U.S.C. § 157.[6]

Secondly, such rights did not contribute to the crime charged. Lastly, the forfeiture of these protected Federal Rights far outweighs any gains that may be achieved from the forfeiture.

Indeed, the forfeiture will only harm those the District Attorney seeks to protect. It is clearly stretching the Statute beyond recognition to attempt to fit these Legal Rights into the definition of "property" used to facilitate a crime.

For these reasons too, the Petitioner's motion to dismiss the indictment should be granted.

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6. For example, the Supreme Court has long held that a job does not constitute a "property right" requiring a Constitutional Due Process hearing before it can be taken away (*Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972)).

IV.

ALTHOUGH PENAL LAW § 10.00(7) CITED BY THE RESPONDENT AS PERMITTING THE PROSECUTION OF AN UNINCORPORATED ASSOCIATION SUCH AS THE LABOR UNION, AND AN UNINCORPORATED ASSOCIATION IS REFERRED TO GENERICALLY AS A "PERSON" (PENAL LAW § 10.00(7)), NO PROVISION HAS BEEN MADE TO ATTACH CRIMINAL LIABILITY TO AN UNINCORPORATED ASSOCIATION.

Although the Prosecution belabors the fact that an unincorporated association such as a Labor Union is referred to as a "person", no provision has been made to attach criminal liability to an unincorporated association. (*Cf.* Special Provisions applicable to the Criminal Liability of Corporations, Penal Law § 20.00).

The minimum requirement for criminal liability is a voluntary act or omission (Penal Law § 15.10) and involves a bodily act or movement (Penal Law § 15.00).

Conduct (that in which offenses are defined) means an act or omission and its accompanying mental state (Penal Law § 15.00(4)).

There is no provision for defining the mental state of an unincorporated association, nor can it have one. It can only have criminal liability vicariously as in the case of a corporation.

Article 20 of the Statute in New York which deals with vicarious liability does not provide for any format for the

criminal liability of an unincorporated association because corporations aside, liability for the conduct of another requires the party charged to have a culpable mental state-something that an unincorporated association is incapable of having.

The provisions of the Penal Law simply do not apply to unincorporated associations. While Article 460 defines enterprise (§ 460.10(2)), to include unincorporated associations, (*see* § 175.00) this is in terms of the *enterprise being a victim*.

Criminal enterprise however, involves a group of persons sharing common purposes.

Accordingly, an unincorporated association may not be a member of a criminal enterprise. The offense itself (Penal Law § 460.20) requires a culpable mental state of intent or knowledge. An unincorporated association such as a Union can be an enterprise under § 460.20(1)(b) which a person acquires an interest in or control of, but not the criminal enterprise that the perpetrator must be associated with or employed by in order for such conduct to constitute the offense.

Ergo, a Labor Union may be a "victim", but never a "culprit" under the enterprise corruption Statute. No other reading of the New York Law is possible.

Accordingly, it is respectfully submitted that the indictment alleges an impossibility which could never be charged to a Jury or proved and accordingly, must be dismissed.

V.

THE NET EFFECT AND AFFECT AND THE OBVIOUS INTENTION OF THE PROSECUTOR HEREIN IS TO UNDERMINE AND EMASCULATE THE RIGHT OF MEMBERS OF THE NMDU, TO "BARGAIN COLLECTIVELY" THROUGH REPRESENTATIVES OF THEIR OWN CHOOSING AND TO ENGAGE IN OTHER CONCERTED ACTIVITIES FOR THE PURPOSE OF COLLECTIVE BARGAINING .... WHICH IS CONTRARY TO THE "WAGNER" ACT (NLRA).

The so called "Wagner" Act § 7 of the NLRA was to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice.

Thus, Congress made it illegal for an employer to interfere with, restrain or coerce employees selecting their representatives. Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. "Full freedom to choose an agent means freedom to pass upon that agent's qualifications." (*Hill v. Florida*, 325 U.S. 538, 65 S. Ct. 1373 (1945).

Thus, the Supreme Court held that Federal Labor Policy prohibits a State from enforcing regulations that prevent a Union from "functioning as a Labor Union (*id.* at 543, 65 S. Ct. at 1375.)" The Court held that allowing a State to restrict the Union's conduct in collective bargaining infringes on the employee's right to bargain collectively through representatives of their own choosing.

Hill v. Florida involved a Statute that provided for State licensing Union business agents and prohibited the licensing of persons who were not citizens for at least ten years, who were not convicted of felonies, or who were not of good moral character. The Statute also required the Unions to file annual reports with the State. The Florida District Attorney obtained injunctions under the State Law prohibiting a Union and certain of its business agents from functioning until they complied with the Statute. The Supreme Court found that the Florida Statute "as applied" conflicted with § 7 of the NLRA. (*See also United States v. Local 807*, *supra*, 315 U.S. 521, 529 (1941).

VI.

WE SUBMIT THAT IT IS CRUCIAL THAT THIS COURT RECOGNIZE THAT THE LEGISLATION, WHICH IS CONSIDERED IN THIS PETITION, NAMELY NEW YORK PENAL LAW § 460.20 (NOW KNOWN AS THE "ENTERPRISE CORRUPTION" LAW) PORTENDS THE VIRTUAL COMPLETE EMASCULATION OF THE WAGNER ACT AND THE LEGISLATION PASSED DECADES AGO KNOWN AS THE NATIONAL LABOR RELATIONS ACT, THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT, AND SO FORTH. THIS STATUTE INCLUDES FORFEITURE PROVISIONS WHICH WOULD FORBID THE PETITIONER HEREIN FROM REPRESENTING ITS MEMBERS IN COLLECTIVE BARGAINING AND OTHER IMPORTANT FUNCTIONS TRADITIONAL WITH THE OPERATION OF THE UNION. IN THE *UNITED STATES v. LOCAL 807*, AND OTHER CASES, *SUPRA*, THIS COURT RECOGNIZED THAT CONGRESS SPECIFICALLY PROHIBITED THE ENACTMENT OF ANY LEGISLATION THAT WOULD IMPOSE SUCH RESTRICTIONS UPON THE UNION. THE LEGISLATION IS IN CONFLICT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS THE FIFTH AMENDMENT THEREOF. AS A UNION AFFECTING INTER-STATE COMMERCE, IT IS CLEARLY WITHIN THE PURVIEW OF THE FEDERAL LAWS, INCLUDING THE NLRA, THE LMRDA, ETC.

A. Moreover, under New York Law, the Petitioner comes within the ambit of the General Associations Law of the State of New York, particularly Section 13 thereof. There is no indication that the Prosecution complied with that act which requires proof that all of the members of the Union, in essence, approved or ratified the actions of the Union.

Prior to the enactment of Legislation such as the NLRA, the LMRDA, and similar acts, the Labor Unions were, in many instances, condemned as "conspiracies". Once the legislation known as the Wagner Act and the NLRA, the LMRDA, etc., were passed, many decades ago, the Unions were able to function as proper representatives of their membership and engaged in collective bargaining and so forth. The Legislation, which is the subject of this Petition, namely Penal Law § 460.20 ("Enterprise Corruption"), if validated and upheld, would emasculate to a significant extent the protections and benefits that were achieved by Wagner Act and its progeny. Thus, it is crucial for this Court to recognize that the impact of the New York Statute transcends this particular case and would affect virtually every Union engaged in Inter-State Commerce as is the Petitioner. There is a forfeiture prevision that goes along with this Statute which would forbid this Union from engaging in collective bargaining on behalf of its members and other traditional activities to a significant extent.

As we have demonstrated previously in this Brief, this Court, in *United States v. Local 807*, *supra*, 315 U.S. 521 at 529, recognized there was a specific prohibition against enacting Legislation of this sort that would undermine the functions of Unions and render them as they were before the Wagner Act.

Under such cases as *Martin v. Curran*, 303 N.Y. 276 (1951), the highest Court of the State of New York held:

> The liability to be enforced in any such suit, in which Association Officers are named as representative defendants, [which is not the situation herein], is still that of the individual members as individuals, and so the cause of action has to be one 'for or upon which the plaintiff may maintain such an action . . . against all the Associates, by reason of their . . . liability therefor, either jointly or severally'. General Associations Law §13.

Thus, we maintain that it is essential in the case at bar for the Prosecution to have shown that all of the members of the Petitioner ratified or approved of the actions which are charged against the Petitioner in order for this suit to have been brought at all which applies equally to an indictment.

So far as we can discern, it does not appear that the members of this Association, either authorized or ratified the specific acts complained of. The Prosecution herein, does not allege negligence, but is seeking an indictment where criminal intent is specifically required. In other words, *intentional harm, that is criminally speaking, is an essential prerequisite* for the finding of an indictment against the defendant.

In the case of *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249 (1954), the Court of Appeals of the State of New York at Page 331 thereof, held in essence that the absence of authorization or ratification by *all* of its members, an association can only be held liable for the unintentional act

of an agent or employee and cannot be held to account for the intentional act of an agent which results in the commission of the crime. (*Cf. Kirby v. Dubinsky*, 39 Misc. 2d 1064, 242 N.Y.S.2d 543 (1963)).

Additionally, unlike some other jurisdictions, under *Martin v. Curran, supra*, New York still follows the Common Law Rule that members of an Unincorporated Association are not agents of that association. Thus, in order to find an association, *qua* association, it is essential that the respondent herein must be able to establish that every single member of the Union, which is an Unincorporated Association, approve or ratify the actions of the Union which the Prosecution has included in its proposed indictment. Since the action of the Union, which is the subject of the complaint and indictment of the Prosecution is an *intentional violation of law*, it is inconceivable that the Prosecution could establish that every single member of the association (that is the Union) approved or ratified those acts.

Thus, we maintain that the indictment herein must be dismissed and that to hold otherwise would violate the equal protections of the laws to which the Petitioner is entitled and a whole line of authority would have to be emasculated.

VII.

THE PROSECUTION PLACES GREAT RELIANCE ON THIS COURT'S CASE, *UNITED MINE WORKERS v. GIBBS*, 383 U.S. 715, 86 S. Ct. 1130 (1966), TO JUSTIFY ITS REVERSAL OF JUSTICE ROTHWAX'S INCISIVE OPINION DISMISSING THE INDICTMENT. THAT RELIANCE IS MISPLACED.

We urge this Court to recognize *Mine Workers v. Gibbs* is not apposite because that case is a Civil Case and involved Tort liability wherein *Gibbs* was seeking to recover monetary damages for certain acts of the Union.

Additionally, the Supreme Court reversed, very substantially, what had been held in the Courts below in that case and the issue turned to a significant extent upon "pendent jurisdiction", and the State Law of Tennessee. Thus, we maintain that the Appellate Division erred in reversing Justice Rothwax's determination.

The instant matter is a Criminal Case requiring proof beyond a reasonable doubt of *intentional criminal actions* on the part of the Union itself which we maintain was not established and cannot be established under the Law of New York nor under any other theory in New York which was presented in accordance with the Law. (*See* Section 13 of the General Associations Law).

The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, reversed the opinion of Justice Rothwax dismissing the indictment. While we submit that the indictment should have been dismissed, we further maintain that Justice Rothwax predicated the

dismissal on only one of many grounds that exist for his action. These grounds we set forth in the within Brief *supra*.

The Appellate Division decision and opinion appears at 250 App. Div. 2d 207, 683 N.Y.S.2d 488 (1st Dept. 1998).

It is paradoxical that the opinion of the Appellate Division (683 N.Y.S.2d at 492), seeks to distinguish the case of *Martin v. Curran, supra* by noting that it was not applicable because of the fact that *Martin* addressed "Tort Liability". Yet, a few paragraphs later, the Appellate Division itself refers to *Mine Workers v. Gibbs, supra* as justification for its action and that case also involved only Tort Liability. Furthermore, the Appellate Division seems to agree at 683 N.Y.S.2d 492, that Section 13 of the General Associations Law requires:

> . . . for better or worse, wisely or otherwise, the Legislature has limited such suits . . . *to cases where the individual liability of every single member can be alleged and proven* . . .

The reasoning of the Appellate Division's Conclusion is very troubling and seems to fly in the face of the Wagner Act and the NLRA and those Federal Statutes which clearly pertain to the Petitioner herein.

The determination of the Appellate Division is that the State has a right to "provide a Statutory vehicle to indict pervasively corrupt associations, including Unions under appropriate circumstances, regardless of their particular form. Hence, there is no sound legal basis to insulate from criminal liability an Unincorporated, but highly structured and purposely active, association in which corruption is alleged

to be pervasive, solely because it is an association." (*id.*, 683 N.Y.S.2d at 492).

The function of the Federal Statutes and the Wagner Acts must be respected and obeyed in the drastic determination of the Appellate Division which we submit is an anachronism which would return the status of Unions to the pre-Wagner dilemma that existed and was remedied by the enactment of the NLRA and its progency.

Thus, we maintain that the reasoning of the Appellate Division, is in conflict with Federal Legislation and would in essence, approve of the destruction of the NLRA and its progency in important aspects.

CONCLUSION

The Petition for Certiorari should be granted and indictment should be dismissed as contrary to Federal Law as cited *supra* and as contrary to the Fifth and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED DECEMBER 3, 1998

The PEOPLE of the State of New York,

Appellant,

v.

The NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY,

Defendant-Respondent.

Supreme Court, Appellate Division,
First Department.

Dec. 3, 1998.

* * *

JOSEPH P. SULLIVAN, J.P., ERNST H. ROSENBERGER, ISRAEL RUBIN, PETER TOM, JJ.

TOM, J.

This case arises from a widespread investigation into corruption in the Newspaper and Mail Deliverers Union of New York and Vicinity. The Union, an unincorporated association, controls the distribution and delivery of newspapers, magazines and periodicals in the New York Metropolitan area. The Union has collective bargaining agreements with the New York Times, the Daily News, the

Appendix A

New York Post, El Diario and the Metropolitan News Company, many of whose employees are Union members.

The investigation, as set forth in the indictment, revealed several illegal schemes operated by the Union's officers, members and agents, including organized crime associates, as well as employees of the newspaper companies. A brief overview will suffice to place the issues in context. The Union leadership maintained allegedly fictitious employees on the Union books, for whom target employers would pay wages and union fees as per collective bargaining agreements. In order to maintain the fiction, duly appointed foremen had to conspire with the union chapel chairmen (basically shop stewards) who were supposed to monitor payrolls. Others falsified newspaper returns, for which newspaper distribution companies, specifically Metropolitan, would refund thousands of dollars. For this, foremen had to cooperate with the distributors. Some stole newspapers off of the loading docks that would be delivered to "bootlegger" (i.e., non-union) distributors. Others received bribes from the bootleggers to ensure quiescent labor activity. The bootleggers' very existence depended on cooperation by the Union's business agents who would decline enforcement of the Union's collective bargaining agreements, and by company foremen who would assign union drivers to make deliveries to the bootleggers. Some paid bribes to newspaper company employees. Some also stole strike funds held in trust for members for the 1990 Daily News strike. The Union's Executive Board, elected by and acting on behalf of the Union, ensured Union membership for confederates who were ineligible for membership under the Union's rules, from whom the Union received dues. The People's theory is

that Union members implicitly ratified those decisions. Several foremen and other members received expedited seniority to which they were not entitled, essentially depriving bypassed members of the correlating seniority benefits. Union members who complained about the activities done in the name of the Union were assaulted. Numerous unindicted enterprise members who were Union members also were alleged to be members or affiliates of organized crime.

As a consequence of this investigation, an indictment was filed against the Union charging it with a single count of enterprise corruption under Penal Law § 460.20, predicated on 81 pattern acts allegedly committed by these officers, members and agents in connection with newspaper distribution and various racketeering activities. Several of the individual enterprise members were separately indicted for enterprise corruption as well as for several of the substantive offenses that made up the pattern acts alleged against the Union. The pattern acts include grand larceny arising from the theft of newspapers from loading docks; falsifying business records; conspiracy to falsify business records relating to health insurance, checks issued to phantom members and newspapers stolen from loading docks; conspiracy to commit grand larceny by improperly promoting favored members and thereby stealing the seniority rights of others; commercial bribery; bribery of a Union official; assault in the second degree, accomplished by the time-honored tradition of using a baseball bat on an uncooperative Union member; coercion; and coercion with the intent to impair the integrity of the Grand Jury.

Appendix A

The individual participants who were separately indicted included: James Galante, allegedly a member of the Bonanno crime family, who pleaded guilty to enterprise corruption; John Vispiano, a New York Post union foreman, who also pleaded guilty to enterprise corruption, and to bribe receiving; Joe Steo, also a New York Post foreman, who pleaded guilty to grand larceny; Michael Diana, a union business agent, who pleaded guilty to enterprise corruption arising from his theft of strike funds from another union; and Leo D'Angelo, general foreman at Metropolitan News Company, who pleaded guilty to enterprise corruption arising from his participation in a phantom employee scheme, the improper elevation of an employee resulting in the theft of seniority rights from others and his arrangement of an assault on a non-cooperating union member. Two assistant foremen, Jackie Piervencenti and Thomas Carrube, pleaded guilty to perjury. Michael Alvino, the Union president from 1989 to 1991, pleaded guilty to criminal contempt arising from his Grand Jury testimony in connection with his delivery of bribes to another former Union president, Douglas LaChance. LaChance, for his part, had been convicted on a Federal indictment for his receipt of bribes during his tenure as president during the 1970's, a history that did not dissuade voting members from re-electing him to that post in 1991. Nor did Alvino's testimony in the Federal action, conceding his delivery of the bribes to LaChance, similarly dissuade members from electing Alvino in 1989. The facts as alleged in the present indictment portray a corruption sufficiently pervasive to have converted the Union hierarchy into a subterfuge, where the confederacy actually operated the Union for the benefit of the confederates.

Appendix A

The issues as to whether the Union, as an unincorporated association, could be indicted, and whether the Grand Jury instruction on Labor Law § 807(6), holding Unions liable for the acts of their officers, members or agents, under appropriate circumstances, properly communicated the correct principles of law, are presented for review on this appeal. The theory of the prosecution against the Union is that these acts by the indicted individuals were made possible by the Union's complicity.

In presenting the case to the Grand Jury, the prosecutor instructed it on Labor Law § 807(6), a provision insulating unions in labor disputes from liability for the acts of individual officers, members or agents, except upon proof of the union's actual conduct, established by proof of "actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization." The prosecutor instructed the Grand Jury that in order to indict the Union, it had to find this section satisfied. The Grand Jury indicted.

When the indictment against the Union was filed, the prosecutor also filed a special information seeking forfeiture of Union property, including contract rights, pursuant to Penal Law § 460.30.

In moving to dismiss the indictment on legal sufficiency grounds, the Union claimed that as an unincorporated association whose putative liability was predicated solely on the purportedly unauthorized acts of its members and agents, it cannot be held liable since such conduct could not be imputed to it. The Union also argues that it was impossible

to establish the mental state, in toto, of an unincorporated association, requiring proof of the aggregate mental states of its members. The Union also challenged the Grand Jury instruction as being inadequate to explain the basis of the Union's liability.

The motion court, construing the Union to be a "person" under the Penal Law's general definition of the term, and hence a party covered by the enterprise corruption statute's class of "persons" subject to liability, rejected the Union's challenge to legal sufficiency as a matter of law and also under the facts of the case. To this extent, we agree. However, the court concluded, citing Martin v. Curran, 303 N.Y. 276, 101 N.E.2d 683, that under New York common law, and absent a statute specifically abrogating common law, an unincorporated association could not be guilty for the acts of its members unless all members authorized or ratified the unlawful acts of the erring members. Hence, the motion court concluded that the wrong legal principle was applied and dismissed the indictment. The court concluded, correctly, that Labor Law § 807(6), the statute charged to the jury as the basis for the Union's vicarious liability, applied only to labor disputes and not to the present case, but incorrectly held that the common law principle pursuant to Martin v. Curran (supra) barred the action in the absence of specific enabling legislation.

The court also generally upheld the Grand Jury instructions defining enterprise corruption and related principles as being "sufficiently detailed to provide meaningful assistance to the Grand Jury in applying the complex legal definitions contained in the enterprise

corruption statute to the evidence before them." Here, too, we agree with the conclusion. However, the court found the meaning of "actual participation," "actual authorization," and "ratification . . . after actual knowledge," which it characterized as being "not intuitively obvious," to be insufficiently clear to instruct the grand jurors on how to intelligently evaluate the facts before them on the central issue, the imputation of liability from individuals to the Union. The court found that "the deficiency in the charge . . . created the strong possibility that the NMDU was indicted merely because many of its officers, members or agents had been involved in the commission of the 81 pattern acts alleged in the indictment, and without any evaluation of whether their participation was sufficient to establish that the union as a whole had participated in the crimes or had authorized or ratified their conduct . . .". We disagree.

Initially, the Union as an entity is within the scope of the enterprise corruption statute. A criminal enterprise includes "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents" (Penal Law § 460.10[3]). A "person's" guilt of enterprise corruption arises from, inter alia, intentional conduct or participation in the affairs of the enterprise by participating in a pattern of criminal activity (Penal Law § 460.20[1][a]). Although article 460 does not elaborate on what it means by "person," the Penal Law defines a "person" to include an unincorporated association (Penal Law 10.00[7]). The Legislature has thereby undermined the core point of Martin

v. Curran (supra) upon which the motion court relied — that an unincorporated association cannot be treated as a "person" under the law. Adoption of defendant's position, that unincorporated associations cannot be criminally liable, would render § 10.00(7) meaningless.

Moreover, imposing criminal liability on a Union as a "person" under § 460.20 accords with the legislative findings prefacing article 460 that "[o]rganized crime in New York State involves highly sophisticated, complex and widespread forms of criminal activity" . . . and "continues to expand its corrosive influence in the state through illegal enterprises engaged in such criminal endeavors. . . ." The statute is intended as a vehicle to combat organized crime's infiltration and corruption of unions, to keep them from being "employed as instrumentalities, injured as victims, or taken as prizes. Through such infiltration the owner of an enterprise can be diverted to criminal ends . . . or it can be taken over entirely, either on paper or de facto" (Penal Law § 460.00). The Legislature correlated the prevalence of organized crime with the inadequacy of sanctions and remedies available to grapple with often shadowy structures. Rather than providing precise definitions to terms, the Legislature directed that "definitions should be given their plain meaning . . . in the context of the legislative purposes . . .". Defining a "person" to include this unincorporated association, especially in the context of the union's subversion by organized crime, is well within the context of article 460's legislative intent. To hold to the contrary would frustrate the purpose of article 460.

Defendant contends that, notwithstanding Penal Law § 10.00(7), an unincorporated association lacks sufficient

cohesion to impose liability on the whole without regard for the aggregate individual actions of its collective associated members. However, a union, and particularly this union, is not a diffuse, formless collection of people linked only by association, as construed historically, that is the necessary underpinning of defendant's argument. Rather, modern unions are highly structured, hierarchical, business entities that exist to advance the interests of their members.

One salutary effect of broadening the net of liability to include unincorporated associations, under carefully limited circumstances, is to encourage such entities to better police those agents who ostensibly act in furtherance of their association duties (Jund v. Town of Hempstead, 941 F.2d 1271, 1280 (2nd Cir. 1991)). The more evolved nature of modern unions brings to mind the observation that racketeering prosecutions historically netted individuals, but, as these individuals were replaced by other corrupt individuals, the corrupt entity usually continued to operate (see, e.g., Goldberg, Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement, Duke Law J 903, 907 [1989]), which leads directly to the legislative findings prefacing Penal Law article 460. The intent of article 460 was to provide a statutory vehicle to indict pervasively corrupt associations, including unions under appropriate circumstances, regardless of their particular legal form. Hence, there is no sound legal basis to insulate from criminal liability an unincorporated, but highly structured and purposefully active, association in which corruption is alleged to be pervasive, solely because it is an association.

Nor can the Union avail itself of an observation that its constituent members were actually the ones victimized by a cadre of criminals, thereby somehow exonerating the Union of liability for that victimization. Many members certainly seem to have been victimized, and there was individual culpability, leading to separate indictments, but the culpable individuals acted under the aegis of a particular entity, the Union, whose structure and instrumentalities were the means by which all crimes alleged were carried out. As alleged in the accusatory materials, the acts and intents of these individuals were the acts and intent of the Union.

Nor does the 1951 decision in Martin v. Curran (supra) state applicable principles of liability. First, Martin addressed tort liability, arising out of defamation by a union's journal not specifically ratified by all union members, rather than criminal liability, so that the case was neverdirectly on point. Second, the majority opinion in Martin, dismissing General Associations Law § 13, found that "for better or worse, wisely or otherwise, the Legislature has limited such suits . . . to cases where the individual liability of every single member can be alleged and proven. . . . [T]his court does not revise statutes . . . to bring the law into accord with modern fact" (id. at 282, 101 N.E.2d 683). The legislative enactment of Penal Law article 460, when read with the definition of person in § 10.00(7), armed prosecutors to seek indictment of corrupt associations formerly thought to be too inchoate to constitute autonomous entities, and manifestly has "[brought] the law into accord with modern fact." This leads to the third basis for disavowing the application of Martin to these facts: its literal application in the current, criminal, context would clearly frustrate the legislative intent behind

the enactment of Penal Law Article 460. If Martin's common law rule precludes prosecution of this union under these circumstances, that logic effectively protects a corrupt union from State RICO liability and insulates its treasury from State RICO enforcement as to ill-gotten gains notwithstanding compelling legislative declarations to the contrary. Finally, we have not hesitated to discard obsolete common law doctrines when the needs addressed by the doctrine have become outmoded as a consequence of changed historical circumstances (see, Adams v. New York City Transit Authority, 211 A.D.2d 285, 626 N.Y.S.2d 455, affd. 88 N.Y.2d 116, 643 N.Y.S.2d 511, 666 N.E.2d 216).

Turning to the instructions, preliminarily, we do not share the motion court's concern that key terms in Labor Law § 807 were not sufficiently defined to provide direction to the grand jurors in their evaluation of the evidence. To the contrary, rather than referencing obscure legal concepts, they have neither technical nor specialized meanings, are used in everyday parlance, and there is no reason to conclude that the grand jurors in any manner were inadequately instructed in this regard (see, Browne v. International Brotherhood of Teamsters, 203 A.D.2d 13, 15, 609 N.Y.S.2d 237 ("actual authorization"); United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395, 406, 67 S.Ct. 775, 91 L.Ed. 973 ("knowing participation"; "actual authorization"); accord Nathan's Famous, Inc. v. Local 1115, 70 Misc.2d 257, 258-259, 332 N.Y.S.2d 513).

However, § 807 is applicable to labor disputes, does not purport to establish a standard of criminal liability and does not state appropriate principles applicable under the Penal

Law. Nevertheless, insofar as § 807 imposes a heightened standard before allowing imputation of liability from union officers to the union, defendant can hardly claim to have been prejudiced by the advantageous instruction or to have been indicted on the basis of mere agency (see, e.g., the Federal version of Labor Law § 807(6), 29 USC 106(6), which the United States Supreme Court found to impose a sufficiently stringent standard for criminal liability [United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218]; see also, United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395, 406, 67 S.Ct. 775, 91 L.Ed. 973). Hence, defendant was indicted under far more exacting standards than would be applicable to a corporation — that a Board or high managerial agent recklessly tolerated the criminal conduct of its agents (Penal Law § 20.20).

The Grand Jury was given adequate information to enable it to decide intelligently whether a crime has been committed by the Union and to determine whether there exists legally sufficient evidence to establish the material elements of such crime (see, e.g., People v. Hewitt, 233 A.D.2d 171, 649 N.Y.S.2d 663, citing People v. Calbud, Inc., 49 N.Y.2d 389, 394-395, 426 N.Y.S.2d 238, 402 N.E.2d 1140). The Union has not met its "heavy" burden of establishing that the instructions were so deficient as to impair the integrity of the Grand Jury proceeding and thereby warrant the "extraordinary remedy" of dismissal (see, People v. Harrison, 238 A.D.2d 271, 657 N.Y.S.2d 325, lv. denied 90 N.Y.2d 894, 662 N.Y.S.2d 437, 685 N.E.2d 218; People v. Jones, 239 A.D.2d 234, 657 N.Y.S.2d 641).

Accordingly, the order of Supreme Court, New York County (Harold Rothwax, J.), entered on or about June 19, 1996, which dismissed the indictment for enterprise corruption (Penal Law § 460.20) should be reversed, on the law, the indictment reinstated and the matter remanded for further proceedings.

Order, Supreme Court, New York County (Harold Rothwax, J.), entered on or about June 19, 1996, reversed, on the law, the indictment for enterprise corruption reinstated and the matter remanded for further proceedings.

All concur.

APPENDIX B — OPINION OF THE SUPREME COURT, NEW YORK COUNTY DATED JUNE 19, 1996

The People of the State of New York,

Plaintiff,

v.

Newspaper and Mail Deliverers' Union of New York and Vicinity,

Defendant.

Supreme Court, New York County,

June 19, 1996

* * *

OPINION OF THE COURT

Harold J. Rothwax, J.

The defendant Newspaper and Mail Deliverers' Union of New York and Vicinity (hereinafter NMDU) has been indicted for a single count of enterprise corruption (Penal Law § 460.20) based on 81 pattern acts committed by individual unindicted NMDU officers, members, or agents acting together and with other unindicted co-conspirators who worked for the distribution departments at two newspaper companies and an independent distribution company with which the NMDU had collective bargaining agreements or who operated nonunion "bootleg" companies

with which the NMDU had no such agreements. Several of the unindicted co-conspirators, including some union members, are alleged to have ties to organized crime. The same Grand Jury which indicted the NMDU voted two separate indictments charging the various individual actors with enterprise corruption and/or the substantive crimes which make up 71 of the 81 pattern acts charged in the indictment against the NMDU.

The NMDU moves to dismiss the indictment as based on legally insufficient evidence to establish the liability of the labor union for the criminal acts alleged and as defective because the instructions on the union's liability were incorrect and inadequate. (CPL 210.20 [1] [a], [b], [c]; 210.35 [3], [5].) This is apparently the first time a labor union has been charged with criminal conduct as a person under New York law.

Enterprise corruption is defined by Penal Law § 460.20:

"1. A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:

"(a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity . . .

"2. For purposes of this section, a person participates in a pattern of criminal activity when, with intent to participate in or advance the affairs of the criminal enterprise,

he engages in conduct constituting, or, is criminally liable for pursuant to section 20.00 of this chapter, at least three of the criminal acts included in the pattern".

A labor union is an artificial entity which cannot act except through individuals. Therefore, for the NMDU to be prosecuted for enterprise corruption, it must be held vicariously liable for acts committed by its officers, members, or agents. The first issue is whether a labor union may ever be prosecuted as an artificial person for crimes defined by the Penal Law and, if so, whether the NMDU may be prosecuted for enterprise corruption.

Penal Law § 10.00(7) defines "person" as "a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality." This statute clearly states the legislative intent that an unincorporated association, such as a labor union, may be criminally liable under New York law. However, while the Legislature enacted a statute defining the scope of a corporation's criminal liability (Penal Law § 20.20), it did not enact a statute defining the scope of an unincorporated association's criminal liability. This statutory lacuna has made it difficult if not impossible for the prosecution in this case to instruct the Grand Jury on the correct legal theory for a union's criminal liability and to do so in a meaningful way. Indeed, the NMDU's main argument is that the failure of the Legislature to enact a statute defining the criminal liability of an unincorporated association demonstrates the Legislature's intent to exclude such associations from criminal liability, notwithstanding the

inclusion of unincorporated associations in the Penal Law definition of "person". This interpretation is erroneous.

The general rules of statutory construction require that a statute " 'must be read and given effect as it is written by the Legislature' " and in accordance with the natural and ordinary meaning of the words. (Parochial Bus Sys. v Board of Educ., 60 NY2d 539, 548 [1983], quoting Lawrence Constr. Corp. v State of New York, 293 NY 634, 639 [1944]; McKinney's Cons Laws of NY, Book 1, Statutes §§ 92, 94.) "In the course of construing a statute the court must assume that every provision thereof was intended for some useful purpose". (McKinney's Cons Laws of NY, Book 1, Statutes § 144; see, People v Gaskins, 171 AD2d 272, 279 [2d Dept 1991].) The Penal Law's definition of most substantive crimes, including enterprise corruption, begins with the language "[a] person is guilty of". Therefore, contrary to the defendant's claim, the inclusion of unincorporated associations within the definition of "person" evidences the clear intent of the Legislature that such associations may be liable for crimes defined by the Penal Law.

The failure to enact a statute defining the scope of the penal liability of an unincorporated association does not defeat the clear intent that liability be imposed. Every entity defined as a person under the Penal Law may be held liable "where appropriate" for criminal conduct defined by the Penal Law, except where such entity is specifically excluded from liability by the language of a specific penal statute. (See, Penal Law § 135.60[6]; § 155.05 [2][e][vi]; § 215.50[3] [excluding certain labor union activity from the purview of

coercion, extortion, and contempt statutes]; People v Vizzini, 78 Misc 2d 1040 [Sup Ct, NY County 1974].)

The determination of whether it is "appropriate" to prosecute the NMDU as a person for enterprise corruption turns on two factors: whether a labor union is the type of unincorporated association for which the imposition of criminal liability is appropriate, and whether enterprise corruption is the type of crime for which a labor union may appropriately be held accountable. In the commentary to section 2.07 of the Model Penal Code (1985 ed), upon which the Penal Law is based in part, a distinction is made between "highly organized business associations operating entirely for the purpose of the economic gain of its members" for which "the same considerations justifying corporate responsibility might apply" and "loosely formed societies organized for social, religious, and charitable purposes to which such considerations will have no application." (Id., at 344.) A labor union is of the former type. Therefore, a modern labor union is an appropriate type of unincorporated association for imposition of criminal liability upon the association as a person.

Enterprise corruption (Penal Law § 460.20) is also an appropriate crime for the imposition of liability upon a labor union. Nothing in the enterprise corruption statute exempts a labor union from prosecution for this crime. In the legislative findings section of the Organized Crime Control Act (OCCA) (Penal Law § 460.00), of which the enterprise corruption statute is a part, the Legislature articulated that the purpose of the OCCA is not to "define what organized crime is" but to "define and criminalize what organized crime

does." The Legislature specifically identified "labor racketeering" as one of the ways in which organized crime is operating in New York and concluded that: "The money and power derived by organized crime through its illegal enterprises and endeavors is increasingly being used to infiltrate and corrupt businesses, unions and other legitimate enterprises and to corrupt our democratic processes. This infiltration takes several forms with legitimate enterprises being employed as instrumentalities, injured as victims, or taken as prizes. Through such infiltration the power of an enterprise can be diverted to criminal ends, its resources looted, or it can be taken over entirely, either on paper or de facto. Thus, for purposes of making both criminal and civil remedies available to deal with the corruption of such enterprises, the concept of criminal enterprise should not be limited to traditional criminal syndicates or crime families, and may include persons who join together in criminal enterprise . . . for the purposes of corrupting such legitimate enterprises or infiltrating and illicitly influencing industries." (Penal Law § 460.00.)

A labor union which is alleged to have been heavily infiltrated by organized crime to the point where many of its senior officers, members and agents are engaging in an organized pattern of criminal conduct in their daily conduct of union business cannot escape liability simply because the union is a legitimate association which includes many individual members who are not themselves criminals or affiliated with any organized crime activity. When a labor union has permitted itself to become the instrumentality of a criminal enterprise and its officers, members, or agents are conducting a significant portion of the union's daily

business through a pattern of criminal activity for the purpose of illicitly influencing the industry within which the union operates, the labor union itself may be prosecuted as a member of the criminal enterprise, provided that the People can prove the requisite level of involvement sufficient to impose criminal liability on the organization as an entity. Nothing in this ruling detracts from the responsibility of the individual union officers, members, or agents for enterprise corruption or for the substantive crimes comprising the pattern acts (see, People v Sakow, 45 NY2d 131 [1978]).

While not controlling over New York law, the rules developed by Federal courts for determining when a labor union may be found in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1961 et seq.), upon which the OCCA is based, also support this conclusion. To avoid penalizing a union which is really the victim of organized criminal activity, Federal courts require proof that the union is an "aggressor entity" that is a central figure in the criminal enterprise and not merely a "conduit" that unknowingly facilitated the criminal activity. (Haroco, Inc. v American Natl. Bank & Trust Co., 747 F2d 384, 401 [7th Cir 1984], affd 473 US 606 [1985]; Amendolare v Schenkers Intl. Forwarders, 747 F Supp 162, 168-169 [ED NY 1990]; Gruber v Prudential-Bache Sec., 679 F Supp 165, 180 [Conn 1987].) This determination turns on a number of factors, chief among them the complicity of high level officers. "What constitutes a 'central figure' will vary with the factual circumstances of each case . . . it is necessary to show that an officer or director had knowledge of, or was recklessly indifferent toward, the unlawful activity. Once knowledge or reckless indifference at this high corporate

level has been determined, the court may then consider other factors, among them the number of high-level employees involved in the racketeering activity, their degree of participation in the racketeering activity, whether these high-level employees themselves committed the alleged predicate acts, and whether the corporation directly and substantially benefitted from the racketeering activity." (Gruber v Prudential-Bache Sec., 679 F Supp, supra, at 181.)

In this case, the indictment alleges that one union president, three business agents, several chapel chairmen, and several foremen and assistant foremen (company employees, required to be union members, who were agents of the union with responsibility for enforcing the terms of the collective bargaining agreement) acted together in smaller groups within the hierarchy of the criminal enterprise to commit several criminal schemes. The schemes included one in which the companies paid wages and union dues for employees who actually did no work; several varieties of returns schemes, in which the numbers of returned papers were inflated, the companies paid for returned papers for which they had given the distributor a credit, or papers given as free samples were returned for a full refund; a scheme to sell or give union cards to persons associated with the criminal enterprise who did not have sufficient seniority for membership; a scheme to steal seniority rights by placing an unqualified enterprise associate on the highest union seniority list after he was fired from an assistant foreman position; several schemes by which delivery work which should have been done by NMDU members was diverted to nonunion distributorships; and the theft of strike relief fund money provided by a different union. None of these schemes

would have been possible without the complicity of the NMDU. Moreover, the NMDU directly benefitted from some of the schemes in the form of union dues paid by the distribution companies for no-show employees and induction fees and union dues paid by persons who were granted union cards without sufficient seniority. The union also benefitted in part from the schemes to divert delivery to nonunion companies because a dues- paying union driver was utilized in each case to drive at least one leg of the delivery route. The union benefitted from the theft of strike fund moneys because a significant portion of the money was diverted to a union business agent for the purpose of funding acts of strike violence. Because the NMDU meets the Federal definition of an "aggressor entity" it is appropriate to prosecute it as a person for enterprise corruption. (Cf., Volmar Distribs. v New York Post Co., 899 F Supp 1187, 1190-1196 [SD NY 1995] [finding the NMDU not at fault in a civil RICO action due to lack of proof that it benefitted from a scheme run by its president to secure distribution rights for particular companies in exchange for bribes and through extortion].)

Turning to the adequacy of the Grand Jury instructions to establish the NMDU's liability for enterprise corruption, the court has reviewed the instructions and determined that the prosecution correctly instructed the Grand Jury on the elements of the pattern acts and the elements of enterprise corruption. The instructions were sufficiently detailed to provide meaningful assistance to the Grand Jury in applying the complex legal definitions contained in the enterprise corruption statute to the evidence before them. The prosecutor made some effort to explain how an individual defendant might be employed by or associated with a

criminal enterprise and how an individual might participate in a pattern of criminal activity.

The prosecutor's charge on the NMDU's liability, however, stands in stark contrast. The prosecutor stated:

"In considering the union's liability, you must be aware of the following two statutes:

"Penal Law Section 10.00 subsection seven defines a person to include or [where?] appropriate, quote, an unincorporated association, unquote.

"Labor Law Section 807 subsection six provides that, quote, no association or organization participating in — participating or interested in a labor dispute shall be held responsible in any criminal prosecution, [for] the unlawful acts of the individuals, officers, members or agents except upon proof by weight of the evidence and without the aid of any presumptions of law or fact of (a) the doing of such acts by persons who are officers, members, or agents of any such association and (b) the actual participation in or actual authorization of such acts or ratification of such acts after actual knowledge thereof by such association or organization.

"For the purposes of this grand jury, I charge you that with respect to the acts charged in this indictment, the NMDU is, quote, an association or organization participating and interested in a labor dispute, end quote, and so, in order to vote an indictment in addition to all of the other requirements that I've charged you about earlier today and in the past,

you must find that this section that I just read to you is also satisfied." (Grand Jury transcript, at 4087-4088.)

No other instructions were offered on the critical issue of the NMDU's liability. One of the most important determinations to be made by a Grand Jury is whether there exists reasonable cause to believe that the accused committed the charged crimes. (CPL 190.65[1][b].) This charge did not permit the jury intelligently to make that determination.

The prosecutor's charge to the Grand Jury need not be as complete or detailed as a Judge's charge to the petit jury, but it must give guidance adequate for the Grand Jury intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime. (People v Calbud, Inc., 49 NY2d 389 [1980]; People v Valles, 62 NY2d 36 [1984].) In most cases, the prosecutor's obligation to instruct a Grand Jury may be met by reading the appropriate sections of the Penal Law defining the crime. (People v Calbud, Inc., 49 NY2d, supra, at 395, n 1.) However, in some situations, the instructions to the Grand Jury may be so misleading, incomplete, or confusing as to substantially undermine the integrity of the proceedings. In those cases, the indictment must be dismissed even where it is supported by legally sufficient evidence. (People v Calbud, Inc., 49 NY2d, supra, at 394-395; People v Valles, 62 NY2d, supra, at 38; People v Caracciola, 78 NY2d 1021, 1022 [1991]; People v Batashure, 75 NY2d 306, 311-312 [1990].) The error in the Grand Jury charge must be so significant as to create the possibility of prejudice to the defendant but need not establish actual prejudice. (People v Sayavong, 83

NY2d 702, 709 [1994]; People v Wilkins, 68 NY2d 269, 276-277 [1986].) "Dismissal of indictments under CPL 210.35(5) should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury." (People v Huston, 88 NY2d 400, 409 [1996].)

The chief difference between the indictment of the NMDU and the indictment of the individual perpetrators, which the Grand Jury had voted immediately before being instructed on the law regarding the NMDU indictment, was the definition of the union's liability for the acts of those individual perpetrators. This situation rendered it critical that the Grand Jury be given complete and accurate legal instructions on the standard for imposing criminal liability on a labor union. The failure to define the terms "actual participation", "actual authorization", and "ratification . . . after actual knowledge of" the acts perpetrated by the individual union officers, members, or agents precluded the grand jurors from intelligently evaluating the facts before them on the issue which lies at the very heart of the decision to vote the indictment — the determination that the defendant labor union was responsible for the criminal conduct charged in the indictment. (See, CPL 190.65[1][b].)

The meaning of these terms is not intuitively obvious. The terms are taken from the Norris-LaGuardia Act (29 USC § 106), upon which Labor Law § 807(6) is based, and are similar to the terms of other "little Norris-LaGuardia" statutes adopted by other States. As interpreted by the courts, none of these terms require an actual vote by the membership of the union authorizing in advance the actions or formally

approving of them after the fact. Nor is actual participation of the union limited to situations in which the entire union or a large portion of it participates in the illegal activity.

Courts have found "actual participation" by a labor union where union officials personally take part in the unlawful acts, and after evaluating factors such as the number of union participants, their status within the union, the extent of the union's knowledge of the actions, and its power to control them. (Freeport Transp. v International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, 523 Pa 491, 496-497, 568 A2d 151, 153, cert denied 498 US 899 [1990]; United Aircraft Corp. v International Assn. of Machinists, 161 Conn 79, 88-89, 285 A2d 330, 337-338, cert denied 404 US 1016 [1972].) Mass picketing may be sufficient to establish actual participation. (See, Nathan's Famous v Local 1115, 70 Misc 2d 257 [Sup Ct, Kings County 1972].)

"Actual authorization" may be established where the unlawful acts, or acts generally of the same type and quality, were expressly authorized by the union, either in a formal meeting or vote or by an informal order of the union leadership. (Brotherhood of Carpenters v United States, 330 US 395 [1947]; Gajkowski v International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, 519 Pa 320, 340-343, 548 A2d 533, 543-544 [1988], cert denied sub nom. Gajkowski v Highway Truck Drivers & Helpers Local Union No. 107, 490 US 1022 [1989]; United Aircraft Corp.v International Assn. of Machinists, 161 Conn 79, 88-89, 285 A2d 330, 337, supra.) Authorization may also come from the grant of plenary authority to act on the union's behalf for a specific purpose, such as empowering a specific union

official to conduct a strike and to discipline the participants. (Browne v International Bhd. of Teamsters, 203 AD2d 13, 15 [1st Dept 1994]; Yellow Bus Lines v Drivers, Chauffeurs & Helpers Local Union 639, 883 F2d 132, 136-137 [DC Cir 1989], reh in part 913 F2d 948 [DC Cir 1990], cert denied 501 US 1222 [1991]; see, Brotherhood of Carpenters v United States, 330 US, supra, at 406 [liability may attach upon clear proof that particular act charged is one which necessarily flows from authority granted by the union].) Authorization may also be inferred from the actual participation by a large number of union members, such as in a case of mass picketing. (Nathan's Famous v Local 1115, 70 Misc 2d, supra, at 259.)

"Ratification" requires direct or circumstantial evidence establishing that the union approved of the unlawful acts after learning of them, such as by failing to discipline the perpetrators, or by providing legal counsel, paying bail bonds, or paying criminal fines for perpetrators arrested for such acts, or where the union participated actively or by knowing tolerance in further acts which were themselves actionable or which drew upon the prior violence for their force. (Mine Workers v Gibbs, 383 US 715 [1966]; United Aircraft Corp. v International Assn. of Machinists, 161 Conn 79, 88, 285 A2d 330, 337, supra ["The proof must be of a ratification knowingly made in express and direct acts or terms of assent to the acts complained of by the organization to be charged"].) In Yellow Bus Lines (supra), the court ruled that the local union ratified by knowing tolerance the violence perpetrated by the union official designated to direct a strike on behalf of the union because the union was informed early in the strike of the official's wrongful acts but took no action

to remove or discipline the official. (Yellow Bus Lines v Drivers, Chauffeurs & Helpers Local Union 639, 883 F2d, supra, at 136; see, Bonanno Linen Serv. v McCarthy, 708 F2d 1, 11-12 [1st Cir], cert denied 464 US 936 [1983]; Airco Speer Carbon-Graphite v Local 502, 494 F Supp 872, 877 [WD Pa 1980] ["the acts of an agent can be ratified by inaction which manifests consent"].)

The deficiency in the charge in this case substantially undermined the integrity of the Grand Jury proceeding and created the strong possibility that the NMDU was indicted merely because many of its officers, members, or agents had been involved in the commission of the 81 pattern acts alleged in the indictment, and without any evaluation of whether their participation was sufficient to establish that the union as a whole had participated in the crimes, or had authorized or ratified their conduct, thereby prejudicing the NMDU. (People v Darby, 75 NY2d 449, 454-455 [1990]; CPL 210.35[5].) Where the Grand Jury has not been instructed on critical terms necessary for their evaluation of the case, the indictment is defective and cannot stand. (See, People v Ramos, 223 AD2d 495 [1st Dept 1996] [failure to define necessary legal concept of "residence"]; People v Jones, 157 Misc 2d 45 [Sup Ct, Queens County 1993] [failure to instruct on causation and proximate cause where victim died of pneumonia two years after poisoning]; People v Wakefield Fin. Corp., 155 Misc 2d 775 [Sup Ct, NY County 1992] [failure to charge constructive possession and circumstantial evidence]; People v McCloud, NYLJ, May 12, 1992, at 27, col 3 [lack of appropriate instruction on physical injury].) Therefore, the indictment against the NMDU is defective and must be dismissed.

Moreover, even if the bare bones charge could be found to comply with the prosecutor's duty to instruct a Grand Jury meaningfully on the law, the indictment would still have to be dismissed because the prosecution utilized the wrong legal standard in defining a labor union's liability under New York law.

Despite its charge to the Grand Jury, the prosecution has argued that, in the absence of State law defining a union's culpability for enterprise corruption, the Federal rules governing a union's liability under RICO should control. This argument is rejected because the Federal law governing a union's liability in general is at odds with New York State law and provides far less protection to a union than does New York law.

The United States Supreme Court ruled in 1922 that a labor union was an artificial entity subject to the doctrines of agency and respondeat superior, making a union liable for the civil and criminal bad acts of its members. (United Mine Workers v Coronado Co., 259 US 344 [1922].) It is in the framework of this concept of a labor union's responsibility for the acts of its officers, agents, and members that Federal courts have adopted rules for determining when a labor union may be prosecuted for RICO violations. (See, e.g., Cox v Administrator United States Steel & Carnegie, 17 F3d 1386, mod on reh 30 F3d 1347 [11th Cir 1994], cert denied sub nom. Cox v USX Corp., __ US __, 115 S Ct 900 [1995].) New York, by contrast, still adheres to the common-law rule that an unincorporated association is not an artificial person and that no agency relationship exists between the members of such associations, including labor

unions. (Martin v Curran, 303 NY 276 [1951].) A labor union is, therefore, not liable in New York for illegal conduct committed by officers, members, or agents unless it can be established that every member individually authorized or ratified the wrongful act. (Martin v Curran, 303 NY, supra, at 282; Giffords Oil Co. v Boss, 54 AD2d 555 [2d Dept 1976]; Saint v Pope, 12 AD2d 168, 171-172 [4th Dept 1961]; Price v International Bhd. of Teamsters, NYLJ, Jan. 13, 1994, at 28, col 5.) The Martin Court held that this rule was mandated by the absence of a statute abrogating the common law, stating that, "for better or worse, wisely or otherwise, the Legislature has limited such suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven." (Martin v Curran, 303 NY, supra, at 282.)

Applying the Court of Appeals rationale to the issue of a labor union's liability as a person for criminal conduct, this court cannot, in the absence of a penal statute to the contrary, interpret the Penal Law as imposing more liability on a union for the criminal conduct of its officers, members, or agents than is imposed for their tortious conduct. To do so would make it easier to convict a labor union of a crime than to successfully sue that union in civil court. Therefore, a labor union may not be indicted for crimes committed by its officers, members, or agents except upon legally sufficient proof establishing that the union membership as a whole authorized or ratified the specific criminal acts alleged.

The conclusion that the Martin no-agency rule applies to the NMDU's criminal responsibility also precludes the

use of Penal Law § 20.20, defining corporate criminal liability, as an analogue for defining union liability in a criminal prosecution. The People have argued that, once it is determined that a labor union may be criminally liable at all, the labor union must act through its agents just as a corporation does. However, the conclusion that a labor union may be criminally responsible as a person under New York law, and the fact that a labor union may act only through individual officers, members, or agents, does not dictate that the union's criminal liability is based on the agency principles applicable to corporate criminal liability in New York. This is true even though the statute defining corporate criminal liability has been applied to partnerships, which are treated identically with unincorporated associations under the Penal Law — defined as a person for the application of penal statutes, but without any statutory definition of the scope of that personal liability. (People v Smithtown Gen. Hosp., 92 Misc 2d 144 [Sup Ct, Suffolk County 1977].) While a similar adaptation of Penal Law § 20.20 to a labor union might appear to be a rational approach to the issue of liability in this case, such an interpretation cannot be justified under New York law. For, unlike the case of an unincorporated association, New York law recognizes that the agency doctrine applies to partnerships. (Partnership Law §§ 20, 24.) Therefore, Penal Law § 20.20, founded as it is in agency principles, cannot provide a basis for a labor union's criminal liability.

The prosecution argues that it chose to rely on Labor Law § 807(6) for the definition of a union's liability for two reasons: it is the only statute which appears to pertain to the liability of a labor union for criminal acts and it provides a

more stringent standard for liability than Penal Law § 20.20. Neither rationale convinces the court that it is, in fact, the correct standard for an unincorporated association's criminal liability in this State.

Read in isolation, Labor Law § 807(6) seems to govern all criminal suits against a union. The statute states that "no association or organization participating or interested in a labor dispute . . . shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution". (Labor Law § 807[6].) However, section 807 of the Labor Law governs the granting of injunctions against labor unions during labor disputes. It was not enacted together with the Penal Law and is not referenced in the Penal Law as defining a labor union's liability for criminal conduct. Moreover, notwithstanding the equally broad language of Labor Law § 807(6) as controlling "any civil action", the First Department has ruled that the statute has no application outside of the determination of whether an injunction should be granted against a union during a labor dispute and did not define the labor union's liability for injuries sustained by a security guard escorting a truck through a picket line. (Browne v International Bhd. of Teamsters, 203 AD2d, supra, at 14-15.) Federal courts have also ruled that Labor Law § 807(6) does not define the substantive liability of a labor union under New York law for the tortious acts of its members during labor disputes, holding that the Martin no-agency rule applies to pendant State tort claims brought against labor unions in Federal court. (Modeste v Local 1199, 850 F Supp 1156 [SD NY], affd 38 F3d 626 [2d Cir 1994]; R.M. Perlman Inc. v New York Coat, Suit, Dresses, Rainwear & Allied Workers' Union Local 89-22-1, 789 F Supp 127,

133 [SD NY 1992].) Therefore, this statute cannot provide the definition of a labor union's liability for any substantive criminal act committed by a union officer, member, or agent.

Even if Labor Law § 807(6) were found to have some applicability outside of the granting of injunctions, its application is limited to a labor union that is "participating . . . in a labor dispute". The vast majority of the pattern acts charged in the instant indictment did not occur during a labor dispute. Every action taken by a union officer, agent or member bound by the terms of a collective bargaining agreement, even actions which contravene those terms, does not implicate a labor dispute. (See generally, Barclay's Ice Cream Co. v Local No. 757, 41 NY2d 269 [1977], cert denied 436 US 925 [1978].)

Labor Law § 807(10)(c) defines a labor dispute as: "[A]ny controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee." This definition requires a controversy between the union and the employer or prospective employer, or between members of the union, over the terms of the agreement, a condition of employment, or the representation of the union. It does not apply when no such controversy exists.

Appendix B

When determining whether labor activity is conducted within the context of a labor dispute, Federal courts consider whether the employee-employer relationship forms the matrix of the dispute, regardless of the parties involved. This case does not involve any disagreement about the terms and conditions of employment relations and is not a controversy arising out of the respective interests of employer and employee. It involves only an attempt by the State of New York to penalize the union for conducting its daily affairs through a pattern of criminal activity designed to financially benefit the individual enterprise members, including the union. Although many of the pattern acts involved conduct over which there was some disagreement within the union, internal union differences over how union officials are enforcing the terms of a collective bargaining agreement are not labor disputes within the definition of the Labor Law unless they take the form of concerted labor action, such as picketing to convince a company to renew an agreement that work contracted out by the company would be given to shops organized by a particular union. (See, e.g., Jou-Jou Designs v International Ladies Garment Workers Union, 643 F2d 905, 911 [2d Cir 1981].) The majority of the pattern acts charged in this indictment involved no concerted labor activity at all and were wholly unrelated to the concerns of labor-management relations or the terms and conditions of employment.

Most importantly, application of Labor Law § 807(6) to define a labor union's liability for violations of the Penal Law would establish a more liberal definition of a labor union's liability than the common-law rule of no agency articulated in Martin (supra) and would, therefore, expose a

labor union to more liability for criminal acts committed in New York than imposed for civil wrongs. The Martin rule limits union liability to two situations: the authorization or the ratification of conduct by the union membership. It might be argued that these requirements are effectively identical to the "actual authorization" or "ratification . . . after actual knowledge" standards of Labor Law § 807(6), which, as discussed above, may be proven by circumstantial evidence and do not require a vote of the entire membership. The problem with this argument is that all of the courts interpreting these terms were doing so with the understanding that the Norris-LaGuardia Act embodies a somewhat restricted version of agency liability, limiting the union's liability to actions of which it was aware and which it approved. The limitation of the agency principles encompassed by these terms was intended to prevent a labor union from being held responsible for the acts of a few rogue individuals, infiltrators, or saboteurs merely because the individuals were union members participating in a strike authorized by the union. (Brotherhood of Carpenters v United States, 330 US, supra, at 403-406; Aguirre v Automotive Teamsters, 633 F2d 168 [9th Cir 1980].) It is therefore not clear that the case law defining authorization or ratification under the Norris-LaGuardia Act or similar statutes has any real application when the focus of the determination is whether the entire union membership authorized or ratified the criminal acts.

In addition, the Martin rule does not include a concept similar to "actual participation" by the union, which courts have interpreted to apply beyond situations where the entire membership of the union commits the act. While a union

could unquestionably be responsible, without the resort to agency principles, for a crime in which every one of its members participated, courts interpreting the meaning of "actual participation" have interpreted it according to agency principles, finding that a union's actual participation in a criminal act may be established by considering the number of union members involved in the act and their positions of authority within the union, as well as the union's knowledge of the acts and its ability to control them. (Freeport Transp. v International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, 523 Pa, at 496-497, 568 A2d, at 153, supra; United Aircraft Corp. v International Assn. of Machinists, 161 Conn, at 88-89, 285 A2d, at 337-338, supra.) Thus if more than one high ranking union official participated in or supervised the wrongful act, the union itself may be found to have actually participated in the act. Similarly, actual participation may be predicated upon a union president's or executive board's formal or informal order for union members to commit a criminal act. (Gajkowski v International Bhd. of Teamsters, Chauffers, Warehousemen & Helpers, 519 Pa, at 340-343, 548 A2d, at 543-544, supra.) Neither definition can be reconciled with the concept that the union's liability is that of each member individually. No such limitation was placed on the term in the charge to the Grand Jury, leading to the strong possibility that the indictment in this case is founded upon the Grand Jury's misunderstanding of the extremely restricted application of the concept of a labor union's actual participation in a criminal act under New York law. Therefore, the NMDU may have been prejudiced by the incomplete or incorrect charge and the indictment cannot stand.

Appendix B

The liability of a labor union as a person under the Penal Law is that of a labor union in a State civil action. To establish a labor union's liability for a crime committed by any officer, agent or member, the prosecution must establish that every member of the union authorized or ratified the criminal act or that every union member actually participated in the act. This imposes a very difficult burden upon the prosecution and may well preclude the criminal prosecution of a labor union in most cases. Nevertheless, until the Legislature enacts a statute clearly imposing agency liability upon a labor union for the criminal acts of its agents, a trial court may not impose such liability. Even if a labor union as an entity is shielded from criminal liability by this standard, the officers, members, or agents who commit the substantive crimes involved can, as was done in this case, be prosecuted as individuals for those crimes. The indictment is dismissed with leave to re-present the case to another Grand Jury.

[Portions of opinion omitted for purposes of publication.]

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.Sup. 1996.

PEOPLE v NEWSPAPER UNION

APPENDIX C — CERTIFICATE DENYING LEAVE OF THE STATE OF NEW YORK, COURT OF APPEALS DATED AUGUST 26, 1999

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. ALBERT M. ROSENBLATT,

Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

THE NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY,

Appellant.

CERTIFICATE DENYING LEAVE
(Upon Reconsideration)

I, ALBERT M. ROSENBLATT, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

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* ***Description of Order:*** Order of the Appellate Division, First Department, entered December 3, 1998, revesing an order of the Supreme Court, New York County, entered on or about June 19, 1996.

Appendix C

Dated at Poughkeepsie, New York

August 26, 1999

s/ Albert M. Rosenblatt
Associate Judge